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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TRAVIS BATEMAN, Defendant and Appellant.	B285745 Los Angeles County Super. Ct. No. BA448874

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Kevin E. Lerman and Joshua Schraer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Travis Bateman hit another man in the head with a metal pole and killed him. Defendant testified that he had defended himself when the victim—who was taller, heavier, and under the influence of methamphetamine—attacked him. On appeal, defendant argues that the court should have instructed the jury on involuntary manslaughter as a lesser-included offense of murder and should *not* have instructed the jury on contrived self-defense or mutual combat.

We agree that the court had a sua sponte duty to instruct on involuntary manslaughter because there was substantial evidence defendant did not subjectively appreciate that he could kill the victim—and, therefore, lacked malice—but we conclude the error was harmless. As for the instructions the court *did* give, we conclude any error was harmless because, while the instructions could have misled the jury into believing defendant had no right to defend himself, by convicting defendant of the lesser-included offense of voluntary manslaughter based on imperfect self-defense, the jury demonstrated that it was not confused.

We therefore affirm.

PROCEDURAL BACKGROUND

By information dated April 24, 2017, defendant was charged with first degree murder (Pen. Code,[1] § 187, subd. (a); count 1). The information also alleged defendant personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)). Defendant pled not guilty and denied the allegations.

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[1] All undesignated statutory references are to the Penal Code.

After a trial at which he testified on his own behalf, the jury acquitted defendant of murder, convicted him of the lesser-included offense of voluntary manslaughter (§ 192, subd. (a)), and found the personal-use allegation true.

The court sentenced defendant to an aggregate term of 12 years in state prison—the high term of 11 years for the lesser-included offense to count 1 (§ 192, subd. (a)) and one year for the personal-use enhancement (§ 12022, subd. (b)(1)), to run consecutively.

Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

In July 2016, defendant was homeless and split his time between Hollywood and Santa Monica. When he was in Hollywood, he stayed at a small homeless encampment on the corner of Sunset Boulevard and North Orange Drive, where he got to know Randall (Brett) Merhar. Merhar was six feet six inches tall and weighed 272 pounds; defendant, at the time, was five foot ten and weighed about 160 pounds.

1. Prosecution Evidence

At about 10:00 a.m. on July 27, 2016, Jerry Smith was parked on Sunset Boulevard, filling out paperwork in his car. He saw a few homeless men sitting on the sidewalk across the street; they were talking and passing around a substance that some of them appeared to be snorting. Smith was about 50 feet away from the men, and was focused on his paperwork, but he had an unobstructed view.

When Smith glanced up again five to 10 minutes later, he noticed two of the men, later identified as defendant and Merhar, wrestling in the middle of the street. A third homeless man, later

identified as Dennis Ohm, stood nearby. Smith heard a metal pipe hit the ground and saw defendant pick it up. Smith began to film the altercation with his phone.

Defendant, still holding the metal pipe or pole, stood up as Merhar, who had gotten onto his hands and knees, continued to fight. Merhar looked like he was trying to stand up, but defendant threatened him with the pole. Then, Merhar swung his arm at defendant and pushed him away.

Merhar was still on his knees when Smith realized he wasn't using his regular camera; he had filmed a 10-second Snapchat video. When Smith realized his error, he looked down to open his phone's normal video recorder.

A minute or two later, Smith looked up again and saw Merhar lying flat on the ground. Defendant yelled at Merhar and stormed off, looking angry. Smith never saw defendant hit Merhar with the pole.

Meanwhile, Joan LaDuca saw part of the incident as she drove down North Orange Drive toward Sunset. LaDuca testified that defendant was raising his arms and screaming, then hit Merhar on the head with a pole. As Merhar crumpled to the ground, defendant continued to yell at him but did not strike him again. On the ground, Merhar grabbed his head and cried out in pain. Ohm, who was standing near Merhar, looked spaced out. A fourth man was sitting on the ground "sort of nodding off or high."

LaDuca pulled over and called 911.

When Merhar was admitted to the hospital, a urine test revealed 3,422 ng/ml of methamphetamine and 675 ng/ml of amphetamine, a methamphetamine byproduct, in his system. When he died the next day, July 28, 2016, at 5:57 a.m., Merhar's

blood contained 540 ng/ml of methamphetamine—more than 27 times the therapeutic dose—and 150 ng/ml of amphetamine. The blood test was also positive for THC, the psychoactive component of marijuana.

Dr. Job Augustine performed the autopsy. Augustine noticed a small cut above Merhar's left eye, which was bruised and swollen. There were no other apparent injuries to Merhar's head or neck, though he had some abrasions on the knuckles of his left hand.

The cause of death was brain hemorrhage from blunt-force trauma, such as being struck by a pipe or a pole. Augustine observed hemorrhaging at the base of Merhar's skull, where his head met his neck. That area of the head and neck is particularly vulnerable because it contains blood vessels that are "neither protected by the spine nor within the cavity of the skull."

2. Defense Evidence

2.1. Defendant's Testimony

When he met Merhar, defendant was living on the streets and using methamphetamine daily. He smoked methamphetamine with Merhar a few times a week, usually in the spot where the fight took place. Defendant didn't have any reason to fight Merhar.

The morning of July 27, 2016, however, defendant was sleeping in an abandoned office chair when Merhar woke him up, screaming his name and claiming that defendant had accused Merhar of stealing something from another homeless man's backpack. Merhar wanted defendant to help him find the backpack's owner and straighten it out, but defendant refused.

Defendant and Merhar had been arguing for a few minutes when Ohm arrived and asked if either of them had methamphetamine. Merhar did—and he broke some up and mixed it with a crushed Adderall pill. Ohm and Merhar snorted the drugs on the sidewalk, but defendant didn't join them. He was still "coming down" from the previous night's high.[2]

When Merhar finished snorting the methamphetamine-Adderall mixture with Ohm, he stood up and again told defendant to help him find the man with the backpack. When defendant again refused, Merhar punched him in the head from behind. The blow broke defendant's glasses and knocked him to the ground. Merhar straddled defendant and hit him in the head several more times. Then, Merhar grabbed defendant's hair and slammed his head against the ground two or three times. Defendant put his hand between his head and the street to try to protect his head. He had not threatened Merhar in any way before the attack.

Defendant was pinned to the ground, so he grabbed a three- or four-foot-long nearby pole and hit Merhar on the back, "not hard at all." But the blow didn't faze Merhar, who asked if defendant had hit him. Defendant hit Merhar with the pole again—this time on the back of the head—which stunned Merhar enough that defendant could stand up. He grabbed Merhar's shirt and asked why Merhar was punching him, but Merhar kept trying to hit defendant.

When it seemed like Merhar had stopped, defendant let him stand up. Merhar walked over to the grass, then turned

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[2] Defendant had smoked methamphetamine until about midnight the night before and had gone to sleep around 5:00 or 6:00 a.m.

around and said, "I will fucking kill you," as he lunged and swung at defendant. Defendant hit Merhar in the eye with the pole.

Merhar sat down on the sidewalk against a fence, snorting and mumbling. Defendant threw the pole over the fence and walked away, screaming at Ohm about starting the fight. Defendant thought Merhar was merely unconscious, and didn't think he would die.

Defendant was not trying to injure or kill Merhar, and didn't think hitting Merhar would kill him. Defendant believed he was defending himself. Because Merhar was so much bigger and stronger than defendant, defendant knew he couldn't win a fistfight. He was scared Merhar would smash his head open.

2.2. Ohm's Testimony

Ohm, the third homeless man at the scene, saw the fight but had trouble remembering it. He did not know defendant or Merhar, whom he called, respectively, "the small guy" and "the big guy."

The day after the fight, police interviewed Ohm, who told them Merhar and defendant had "started fighting" but defendant "didn't want to fight." Merhar moved toward defendant as if to grab him by the throat, but defendant hit him with a pole. Merhar "kept coming at" defendant, and defendant "told him stop already." Then, when Merhar was on the ground, "he tried to get up and go after [the small guy] again." That's when the pole hit Merhar on the temple.

2.3. Toxicology Expert's Testimony

Dr. John Treuting testified as a toxicology expert for the defense. When Merhar died the day after the incident, he had elevated levels of methamphetamine in his blood.

Methamphetamine is a central nervous system stimulant with adverse effects including hyperactivity, nervousness, aggression, and paranoia.

Between the measurement at death, the time that had passed since the fight, and the fact that Merhar was probably given fluids in the hospital, Treuting calculated that Merhar had highly toxic levels of methamphetamine in his system—probably over 1,000 ng/ml—at the time of the fight. A person with this level of methamphetamine in his system would be "very highly stimulated" and "very capable of processing things in an irrational manner and could be paranoid or aggressive."

DISCUSSION

1. The court had a duty to instruct on involuntary manslaughter, but the error was harmless.

Defendant contends the court was required to instruct the jury on involuntary manslaughter as a lesser-included offense of murder because there was substantial evidence from which the jury could have concluded he lacked malice. We agree but conclude the error was harmless.

1.1. Instructional Duty and Standard of Review

" 'California law requires a trial court, sua sponte, to instruct fully on all lesser necessarily included offenses supported by the evidence.' [Citation.] The requirement applies when there is substantial evidence that the defendant committed the lesser offense instead of the greater offense. [Citation.]

" 'In deciding whether evidence is "substantial" in this context, a court determines only its bare legal sufficiency, not its weight.' [Citation.] Thus, 'courts should not evaluate the credibility of witnesses, a task for the jury' [citation], and

uncertainty about whether the evidence is sufficient to warrant instructions should be resolved in favor of the accused [citation]. Even evidence that is unconvincing or subject to justifiable suspicion may constitute substantial evidence and may trigger the lesser-included-offense requirement. [Citation.]" (*People v. Vasquez* (2018) 30 Cal.App.5th 786, 792 (*Vasquez*).) Therefore, the "testimony of a single witness, including the defendant, can constitute substantial evidence requiring the court to instruct on its own initiative." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

We review de novo the trial court's failure to instruct on a lesser-included offense. (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

1.2. Murder

"Murder is divided into first and second degree murder. (§ 189.) 'Second degree murder is the unlawful killing of a human being with malice … .' " (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) "If the … killing was also deliberate and premeditated, the jury could convict the defendant of first degree murder." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 197.)

"Malice may be express or implied. (§ 188.) Express malice is the intent to kill, whereas implied malice exists 'where the defendant … acted with conscious disregard that the natural and probable consequences of [his] act or actions were dangerous to human life. [Citation.]' [Citation.]

"Implied malice has both objective and subjective components. The objective test requires ' " 'an act, the natural consequences of which are dangerous to life … .' " ' [Citation]. This means the act must carry ' "a high degree of probability that it will result in death." ' [Citation.] The subjective test requires that the act be performed ' " 'by a person who knows that his

conduct endangers the life of another … .' " ' [Citation.] 'In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another—no more, and no less.' [Citation.]" (*Vasquez*, *supra*, 30 Cal.App.5th at p. 793.)

1.3. Manslaughter

An unlawful killing *without* malice is manslaughter. (§ 192; see *People v. Rios* (2000) 23 Cal.4th 450, 460 [voluntary manslaughter]; *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [involuntary manslaughter].)

A defendant is guilty of **voluntary** manslaughter when he commits an unlawful killing *with* express or implied malice, but the malice is negated by operation of law. Malice is legally negated in " 'limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" [citation], or when the defendant kills in "unreasonable self-defense"—the unreasonable but good faith belief in having to act in self-defense [citations].' " (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)

"These mitigating circumstances reduce an intentional, unlawful killing from murder to voluntary manslaughter 'by *negating the element of malice* that otherwise inheres in such a homicide [citation].' [Citation.] *Provocation* has this effect because of the words of section 192 itself, which specify that an unlawful killing … committed 'upon a sudden quarrel or heat of passion' is voluntary manslaughter. [Citation.] *Imperfect self-defense* obviates malice because that most culpable of mental states 'cannot coexist' with an actual belief that the lethal act was necessary to avoid one's own death" or serious bodily injury. (*People v. Rios*, *supra*, 23 Cal.4th at p. 461.)

A defendant is guilty of **involuntary** manslaughter, on the other hand, when he acts *without* malice in the first instance. (*Vasquez*, *supra*, 30 Cal.App.5th at pp. 793–794.) For example, where the defendant lacks the intent to kill and is unaware that his actions endanger human life, he lacks malice even if his beliefs are objectively unreasonable and his actions are objectively dangerous. (*Ibid*.)

Involuntary manslaughter is a lesser-included offense of murder. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145.) "Accordingly, an instruction on involuntary manslaughter is required whenever there is substantial evidence indicating the defendant acted without conscious disregard for human life and did not form the intent to kill." (*Vasquez*, *supra*, 30 Cal.App.5th at p. 794.)

1.4. Instructions Below

Here, the court instructed on murder, voluntary manslaughter due to imperfect self-defense, voluntary manslaughter due to sudden quarrel or heat of passion, and the legally exonerating effect of actual self-defense. The court did not instruct on involuntary manslaughter.

1.5. There was substantial evidence to support the instruction.

"As discussed, a defendant acts without implied malice if he lacks a subjective awareness that his conduct carries ' "a high degree of probability that it will result in death." ' [Citation.] When viewed in the light most favorable to defendant, there was substantial evidence in this case from which a reasonable juror could conclude defendant was not subjectively aware that his actions could kill [Merhar]. (*People v. Millbrook* (2014) 222

Cal.App.4th 1122, 1137 [sufficiency of the evidence supporting lesser included offense instruction viewed in the light most favorable to the defendant].)" (*Vasquez*, *supra*, 30 Cal.App.5th at pp. 795–796.)

Here, defendant testified that his first two hits did not seem to injure Merhar or stop him from assaulting defendant. Even with the third hit, defendant was not trying to injure Merhar or knock him unconscious. He was "definitely not" trying to kill Merhar—and didn't think he *would* kill Merhar. This testimony, if believed, could have supported an inference that defendant acted without malice. In addition, defendant testified that at the time of the fight, he was still "coming down" from the previous night's high, and the jury was instructed that defendant's voluntary intoxication was relevant to whether he formed the specific intent required for murder or manslaughter.

Other evidence also supported a conclusion that the blow was not so wanton and brutal as to demonstrate a conscious disregard for human life. For example, Augustine, the medical examiner, testified that defendant hit a particularly vulnerable area of Merhar's head and neck in which the blood vessels are "neither protected by the spine nor within the cavity of the skull." And aside from a small cut and some swelling above his eye, there were no other apparent injuries to Merhar's head and neck. A reasonable juror could have inferred from this evidence that the blows were not particularly severe and further inferred that defendant believed hitting Merhar would injure him but not kill him.

Viewed in the light most favorable to defendant, there was substantial evidence to support the instruction, and the court was required to give it sua sponte.

1.6. The error was harmless.

"In a noncapital case, the erroneous failure to instruct on a lesser included offense is typically an error of state law. [Citation.] Thus, we must reverse if there is a reasonable probability that the defendant would have obtained a more favorable outcome if the instruction had been given. [Citations.] A reasonable probability 'does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]' [Citation.] An error is prejudicial whenever the defendant can ' "undermine confidence" ' in the result achieved at trial. [Citations.] 'In assessing prejudice, we consider both the magnitude of the error and the closeness of the case.' [Citation.]" (*Vasquez*, *supra*, 30 Cal.App.5th at p. 798, fn. omitted.)

By convicting defendant of voluntary manslaughter, the jury in this case demonstrated that it believed at least some of his testimony. Yet it does not appear that the testimony caused the jury to conclude that defendant acted without malice—rather than with malice that was negated by imperfect self-defense.

First, there is no indication that the case was particularly close or that the jury struggled with its decision. The jury deliberated for just an hour and a half, didn't request read-back of any testimony or ask to re-watch the video, and didn't ask any questions. (Compare *Vasquez*, *supra*, 30 Cal.App.5th at p. 803 [two days of deliberations, several questions, and request for supplemental closing argument indicated jury struggled with its verdict].)

Second, the error here did not strike at the heart of the defense. (See *Vasquez*, *supra*, 30 Cal.App.5th at pp. 799–800.) The defense in this case focused on self-defense rather than lack of malice. Defendant testified primarily about his fear rather

than his intent—and in closing argument, defense counsel mentioned lack of malice only once, in passing.[3]

Third, whereas the defendant in *Vasquez* hit his particularly-vulnerable victim with his fists, in this case, defendant testified that he used a metal pole to fell a much larger man who was acting in a methamphetamine-induced rage. While the evidence that defendant lacked malice was substantial enough to warrant an involuntary manslaughter instruction, it was not compelling, particularly where it wasn't the focus of the defense.

2. Any error in instructing the jury with CALJIC Nos. 5.55 and 5.56 was harmless.

Defendant argues that the instructions on mutual combat and contrived self-defense, which were not supported by substantial evidence, invited the jury to disregard his self-defense claim, thereby violating his constitutional right to present a complete defense. We disagree.

Even assuming the court erred in giving the instructions, by convicting defendant of voluntary manslaughter on an imperfect self-defense theory, the jury demonstrated that it did not fall into the trap defendant identifies. That is, even assuming a hypothetical jury could have understood the instructions to negate defendant's defense, the jury *in this case* plainly didn't read them that way: It convicted him of voluntary manslaughter

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[3] As such, the error did not impact defendant's federal constitutional rights to present a complete defense and to have the jury determine every material issue presented by the evidence. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *People v. Rogers* (2006) 39 Cal.4th 826, 868, fn. 16.)

based on imperfect self-defense. As such, any error was harmless under any standard of prejudice.

DISPOSITION

The judgment is affirmed.

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LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.